United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

75-4021

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

CONSOLIDATED WITH NOS. 75-4025, 75-4026, 75-4024, 75-4036

ON PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

After the remand of this case to the Federal Communications Commission in National Association of Independent Television Producers and Distributors v. Federal Communications Commission, 502 F.2d 249 (2d Cir. 1974), the Commission, at the suggestion of this court, sought the views of the Department of Justice on the future of the prime time access rule (PTAR). 47 C.F.R. §73,658(k). The Department's response, set forth in full in the Joint Appendix (J.A.), pp. 79-81, recommended:

> "that the Commission restore the original prime time access rule as initially formulated and that it accompany this action with an announcement that it intends to let the rule remain in effect for a suitable period, perhaps five years." J.A.-081.

Although the Department believes the exemptions added to the rule and the failure to provide assurances of stability will reduce its effectiveness in promoting competition and diversity, the decision of the Commission was within its discretion and is not reversible.

DISCUSSION

In view of the lengthy briefs filed by a number of parties on various sides of the issues, we will merely outline our position very briefly.

The networks are the hub of a brokerage system involving four other groups: national advertisers, program producers, television stations, and, through the stations, national television audiences. In effect they buy time, and access to audiences, from affiliated stations for the advertisers, and then produce programs or buy programs from independent producers in order to attract viewers for the advertisements. The original PTAR was designed to deal with network dominance in two facts of these relationships, access to station time, and control of independently produced programs. See Order and Report, Network Television Broadcasting, 23 F.C.C. 2d 382, 385, 391-392 (1970) (hereafter

"Network TV"). The purpose of PTAR was defined in terms of the interests of the viewing public, as required by National Broadcasting Co. v. F.C.C., 319 U.S. 190, 216 (1943). That interest was to be promoted by diversity in broadcast service, by increasing the numbers of program sources and of programming ideas. Network TV, supra at 395-97.

The debate since then has been confused by a failure to define terms. Thus the Pearce Report is cited for the proposition that "overall network power has been strengthened," W.A.-167, and apparently their power has strengthened vis-a-vis producers and advertisers. The rule was not intended, however, to protect network producers and advertisers. It has reduced the number of hours of prime time each week programmed by the networks, and thus reduced their dominance in that field.

A finding that network dominance of broadcasting time has been reduced does not necessarily mean that the viewing public's interest has been served, and the Commission has chosen to inquire further into the type of programs being broadcast in access time. This has led to extended discussions of the economics of broadcasting, including the costs of producing and distributing "network quality" 1/

1/ "Quality" covers a spectrum of meanings, combining elements of popular appeal, technical competence, and literary value. See Network TV, supra at 391-92.

syndicated and locally produced programs, the potential for covering those costs and making a profit from advertising revenues, and the problems of securing adequate advance commitments from local stations and advertisers while the future of PTAR has been in doubt. The Commission has found in the light of experience that certain types of programs which are in the public interest have not been, and probably will not be, produced on a significant scale except by the networks, and therefore it should relax the restraint on local stations to permit them to accept more such programs from the networks. Second Report and Order, Consideration of the Prime Time Access Rule, FCC 75-67, J.A.-108. Although the result is a limitation on the PTAR, the Commission's premise has support in the record, and the conclusion should not be overturned unless arbitrary and capricious. E.g., National Broadcasting Co. v. United States, supra at 224.

The First Amendment does not prohibit the Commission's action. While the Commission cannot dictate what a licensee says, it has "neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees." Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 395 (1969).

Our own disagreement with the Commission's decision lies primarily in our expectations regarding the long range potential for varied programming arising from competition among independent producers and syndicators. Although the short run result has been a decrease in diversity, some experimentation has begun with lowering costs of independent productions to make them profitable on a syndicated first-run basis. See W.A.-119-21. Obviously the results are unpredictable, but in our opinion the experiment should have been continued with greater stability. The Commission decided that some limitations should be placed on the experiment in favor of certain more immediate values. While we continue to disagree, we cannot say that the Commission's judgment was without foundation in the record, or its remedy beyond the scope of its authority.

The Commission has the authority to consider the national competitive policies expressed in the antitrust laws as an element of the public interest, see e.g., FCC v. RCA Communications, Inc., 346 U.S. 86, 94 (1953); National Broadcasting Co. v. United States, supra at 223-24. That power, however, is not exclusive of direct operation of the antitrust laws, United States v. Radio Corporation of America, 358 U.S. 334 (1959), and the United States has filed its own suits against the networks directed toward reducing competitive restraints on independent producers.

United States v. CBS Inc. (C.D. Cal., Civ. No. 74-3599 RJK); United States v. American Broadcasting Companies, Inc. (C.D. Cal., Civ. No. 74-3600 RJK); United States v. National Broadcasting Company, Inc. (C.D. Cal. Civ. No. 74-3601 RJK). The effect of these suits may to some extent complement the PTAR in the development of a competitive production industry, but is not dependent on the results of this case. They will be continued regardless of the outcome here.

CONCLUSION

The order of the Commission modifying the prime time access rule should be affirmed.

Respectfully submitted.

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